(8)

No. 04-340

Supreme Court, U.S.
FILED
JAN 24 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SAN REMO HOTEL L.P., THOMAS FIELD, ROBERT FIELD, AND T&R INVESTMENT CORP.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF EQUITY LIFESTYLE PROPERTIES, INC., CALIFORNIA MOBILEHOME PARKOWNERS ALLIANCE, THE MANUFACTURED HOUSING EDUCATIONAL TRUST OF ORANGE, RIVERSIDE AND SAN BERNARDINO COUNTIES, AND MANUFACTURED HOUSING EDUCATIONAL TRUST OF SANTA CLARA COUNTY IN SUPPORT OF PETITIONERS

ELLEN KELLEHER
Executive Vice President &
General Counsel
EQUITY LIFESTYLE PROPERTIES, INC.
Two North Riverside Plaza
Chicago, Illinois 60606
(312) 279-1400

ELLIOT L. BIEN
(*Counsel of Record*)
BIEN & SUMMERS LLP
23 Palomino Road
Novato, California 94947
(415) 898-2900

EDITH R. MATTHAI
STEVEN S. FLEISCHMAN
ROBIE & MATTHAI, APC
500 S. Grand Ave.
Los Angeles, California 90071
(213) 624-3062

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE NINTH CIRCUIT'S ISSUE-PRECLUSION HOLDING WOULD EFFECTIVELY PRECLUDE PROPERTY OWNERS FROM PRESENTING TAKINGS CLAIMS IN FEDERAL COURT	5
II. THE NINTH CIRCUIT'S HOLDING WOULD BE ESPECIALLY PERNICIOUS FOR OWNERS OF RENT CONTROLLED MOBILEHOME PARKS	14
III. CALIFORNIA'S IMPOSITION OF RENT CONTROL ON MOBILEHOME PARKS DEMONSTRATES THAT THE NINTH CIRCUIT'S HOLDING WOULD FORECLOSE VALID TAKINGS CLAIMS FROM BEING LITIGATED ON THEIR MERITS IN FEDERAL COURT	21
IV. *WILLIAMSON COUNTY* SHOULD BE HELD INAPPLICABLE TO "AS APPLIED" REGULATORY TAKINGS CLAIMS WHERE "JUST COMPENSATION" IS IRRELEVANT	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

American Mannex Corp. v. Rozands, 462 F.2d 688 (5th Cir. 1972) 13

Brown v. Legal Foundation, 538 U.S. 216 (2003) 26

Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 27

Casella v. City of Morgan Hill, 280 Cal. Rptr. 876 (Ct. App. 1991) 9

Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004) 9, 22, 23, 28, 29

Chevron USA v. Cayetano, 224 F.3d 1030 (9th Cir. 2000) 9

Chevron USA, Inc. v. Lingle, 363 F.3d 846 (9th Cir.), *cert. granted*, __ U.S. __ (2004) 9

City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002) 23

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 11, 12

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) ..... *passim*

Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992) 8, 12, 14

Front Royal & Warrant County Indust. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 12

Galland v. City of Clovis, 16 P.3d 130 (Cal. 2001) 15, 28

TABLE OF AUTHORITIES – Continued

Page

Haas v. County of San Bernardino, 45 P.3d 280 (Cal. 2002) 18

Hacienda Valley Mobile Estates v. City of Morgan Hill, 343 F.3d 651 (9th Cir. 2003) ..... *passim*

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 26, 27, 28

Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994) 20

Kavanau v. Santa Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) 15, 16, 20, 28

Levald, Inc. v. City of Palm Desert, 998 F.3d 680 (9th Cir. 1993) 24

MHC Operating Limited Partnership v. City of San Jose, 130 Cal. Rptr. 2d 564 (Ct. App. 2003) 19, 20

Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984) 13, 14

Montclair Park Owners Ass'n v. City of Montclair, 90 Cal. Rptr. 2d 598 (Ct. App. 1999) 9, 21

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 25

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 14, 15, 19

Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977) 13

Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 9

San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095 (9th Cir. 1998) 5, 6

San Remo Hotel, L.P. v. City & County of San Francisco, 41 P.3d 87 (Cal. 2002) 6, 20

TABLE OF AUTHORITIES – Continued

Page

Sandpiper Mobile Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623 (Ct. App. 1992) 9

Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999) 9

Santini v. Conn. Hazardous Waste Management Service, 342 F.3d 119 (2d Cir. 2003) 8, 11, 12

Tumey v. Ohio, 273 U.S. 510 (1927) 18

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 4, 18, 19

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) ..... *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 5, 22, 23, 24, 27

STATUTES

28 U.S.C. § 1738 13

Act of May 26, 1790, c. 11, 1 Stat. 122 13

California Code of Civil Procedure § 425.16 23

Title 17, Chapter 17.22, San Jose Municipal Code § 17.22.050 18

Title 20, San Rafael Municipal Code § 20.12.060 18

MISCELLANEOUS

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 27

Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L.Rev. 1360 (1967) 13

TABLE OF AUTHORITIES – Continued

Page

Section 86, of the Restatement (Second) of Judgments 10, 11, 13

Wright & Miller, *Federal Practice & Procedure*, (2d ed. 1988) 6, 13

INTERESTS OF *AMICI CURIAE*[1]

Amicus Equity Lifestyle Properties, Inc. ("ELS") is the nation's largest provider of housing for retirees, seasonal and second home-owners, and recreational vehicle owners. ELS has a controlling interest in 270 communities located in 25 states and representing over 100,000 sites. ELS rents its sites to owners of factory-built housing, including manufactured homes, park models, and mobile homes. ELS is a publicly traded real estate investment trust (REIT) that must distribute over 90% of its income annually to its shareholders. ELS shareholders include pension funds, retirees, and other individuals who depend upon income from these investments. ELS has a fiduciary duty to its shareholders to maximize the value of their investment in ELS by charging rents that reflect the value of the real estate in which ELS has invested on their behalf.

More particularly for present purposes, ELS owns over 20 properties in California, of which 13 (representing over 3,700 sites) are currently subject to rent control ordinances. These ordinances limit annual rental increases to the annual increase in the CPI or a fraction thereof – or, in some cases, to no increase at all. ELS estimates that, if these ordinances are constitutional, hundreds of millions of dollars of value will have been taken from its shareholders and transferred to the residents in these communities. ELS has initiated litigation in

---

[1] All parties have consented to the filing of this *amici curiae* brief. No counsel for any of the parties authored any part of this brief. No person or entity other than the *amici* submitting this brief has made any monetary contribution to the preparation or submission of this brief.

at least five California jurisdictions challenging their rent control ordinances.

Amicus California Mobilehome Parkowners Alliance ("CMPA") is the second largest state-wide association of park owners, dealers, and service and industry representatives. CMPA has been representing the manufactured housing industry for over 15 years. It advocates on behalf of service and industry members and owners of communities consisting of tens of thousands of home sites in numerous mobile home parks in California.

Amicus The Manufactured Housing Educational Trust of Orange, Riverside and San Bernardino Counties ("MHET") was incorporated in 1982 as a non-profit trade association representing the owners of mobile home and manufactured housing communities in the Southern California counties of Orange, Riverside, and San Bernardino. There are over 840 mobile home parks and manufactured housing communities in this tri-county area. MHET is dedicated to promoting the manufactured housing and mobile home business industry and to educating manufactured and mobile home owners, community leaders, and the public about manufactured housing community and mobile park issues.

Amicus Manufactured Housing Educational Trust of Santa Clara County ("Santa Clara MHET") is a separate association representing the owners of mobile home and manufactured housing communities within Santa Clara County, California. There are a large number of manufactured home communities in the county, notably located in San Jose (more than 10,000 sites in almost 60 properties), Sunnyvale (almost 4,000 sites in 14 properties), and Mountain View (about 1,800 sites in six communities).

Therefore, *amici* have a unique perspective on the central issue before the Court: whether property owners entitled to litigate Fifth Amendment taking claims in federal district court, but who may be forced by *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), to first ripen such claims in local proceedings, are subject to issue preclusion upon their promised return to federal district court. While all property owners would be sorely prejudiced by the Ninth Circuit's holding on this issue below – effectively nullifying *Williamson County's* promise of a post-ripening federal forum – the Ninth Circuit's holding would be uniquely prejudicial to *amici* because of the unique strictures of mobilehome rent control ordinances in California.

If the Ninth Circuit's holding below were affirmed, owners of rent controlled mobilehome parks would not merely lose their promised federal forum. The preclusive rulings supplanting that forum would emanate from local administrative regimes that are structurally biased against mobilehome park owners in general and their Fifth Amendment claims in particular. At the behest of potent constituencies – mobilehome owners who are tenants in mobilehome parks – local governments throughout California not only legislate and prosecute rent control cases against mobilehome park owners but also hire the "neutral" hearing officers who decide those cases. Accordingly, only an independent federal district court unrestricted by issue preclusion can provide a neutral adjudication of mobilehome park owners' Fifth Amendment taking claims.

Amici and a group of leading economists submitted an *amici curiae* brief in *Lingle v. Chevron USA, Inc.*, docket No. 04-163, now pending before the Court.

SUMMARY OF ARGUMENT

Section I of this brief will demonstrate that the Ninth Circuit's holding below is irreconcilable with *Williamson County's* promise of a federal forum for Fifth Amendment taking claims. *Williamson County* required certain of those claims to be ripened by local proceedings before the claims could be entertained in federal district court. The necessary implication of that holding was that after the local ripening process the federal district court would fully adjudicate the merits of the deferred claim. But the Ninth Circuit's holding would transform the local ripening requirement into a local killing field which would eliminate the right to litigate the claims in the federal forum. *Williamson County's* promise of a federal forum would be nugatory if rulings made during the local ripening process had issue-preclusive effect in the federal district court.

Section II of this brief will document the unique harm that the Ninth Circuit's erroneous holding would inflict on property owners subject to mobilehome rent control ordinances. Not only would they lose their federal forum, as other property owners would, but the federal forum would be supplanted by preclusive rulings emanating from local proceedings that are structurally biased against the Fifth Amendment claimant. Nor is administrative or judicial review an adequate cure for structural bias at the initial decision making stage. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Section III of this brief will demonstrate that California's unique imposition of rent control on mobilehome parks creates numerous constitutional issues. If the Ninth Circuit's holding is permitted to stand, these meritorious

constitutional claims will never be litigated on their merits in an Article III court.

Finally, Section IV of this brief will demonstrate that, in addition to reversing the Ninth Circuit's holding below, this Court should clarify or limit *Williamson County* to avoid similar prejudice to Fifth Amendment claimants. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court held that exhaustion under *Williamson County* is never required for "facial" takings claims and this holding is equally applicable to "as applied" takings claims which challenge whether the regulation at issue substantially advances any legitimate state interest. *Williamson County's* requirement of pursuing "Just Compensation" at the state level, has no application to Fifth Amendment claims that a local government has taken private property without substantially advancing any legitimate public purpose. (*See* ELS's *amici's* separate brief in *Lingle v. Chevron USA, Inc.*, docket No. 04-163.) Because such a taking is unlawful *ab initio*, the "Just Compensation Clause" of the Fifth Amendment never comes into play. Accordingly, there is utterly no reason to apply *Williamson County* to this type of claim.

ARGUMENT

I. THE NINTH CIRCUIT'S ISSUE-PRECLUSION HOLDING WOULD EFFECTIVELY PRECLUDE PROPERTY OWNERS FROM PRESENTING TAKINGS CLAIMS IN FEDERAL COURT

The salient facts of this case are that the Ninth Circuit first told petitioners to ripen their federal claims by exhausting state judicial remedies, *San Remo Hotel v.*

City & County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998); petitioners duly preserved their federal claims under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); and the California Supreme Court expressly acknowledged their *England* reservation. *San Remo Hotel, L.P. v. City & County of San Francisco*, 41 P.3d 87, 91 n.1 (Cal. 2002). Nonetheless, the Ninth Circuit held that petitioners' promised return to federal district court was in vain because their claims were foreclosed by the state supreme court's decision.

This Court adopted the *England* reservation in the analogous situation of federal plaintiffs forced into state court by *Pullman* abstention. In that context, the Court stated plainly: "When the reservation has been made . . . his right to return [to federal court] will in all events be preserved." *England*, 375 U.S. at 421-22.

Wright & Miller have articulated the essence of *England*'s promise of a right to return to federal court "in all events":

> A party who clearly reserves federal questions following "Pullman" abstention for state-court resolution of state-law issues can return to federal court for decision of the federal issues, *free of preclusion*. (Emphasis added).

18B Wright & Miller, *Federal Practice & Procedure* § 4471 p. 247 (2d ed. 1988). That same freedom from preclusion is equally essential to fulfill the promise of *Williamson County*.

Justice Brennan's analysis in *England* emphasized that federal constitutional claimants cannot be forced to accept a state court's determination of their federal claims:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

England, 375 U.S. at 415 (citations and quotations omitted).

England went on to explain why this Court's certiorari review of a state appellate court's final adjudication is no substitute for an original adjudication of constitutional issues in the federal district courts:

> Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.

Id. at 416-17 (citations and quotations omitted).

That rationale applies *a fortiori* to the case of mobile-home rent control. As demonstrated in Section II, the rulings the Ninth Circuit proposes to beclothe with preclusive effect

emanate from an administrative regime that is structurally biased against the mobilehome park owner. The need for independent adjudication of Fifth Amendment claims by the federal district court is all the more critical in that context.

Furthermore, the Ninth Circuit's holding is irreconcilable with *England*'s emphasis on fact findings as well as legal rulings by the federal district court. That dual emphasis would be nullified if post-*Williamson County* cases in federal court were subject to either issue or claim preclusion based on involuntary state court proceedings. Nor can *Williamson County* be distinguished for present purposes from *Pullman* abstention. The coercive state court proceedings would have exactly the same preclusive effect. As the Second Circuit held in *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 119, 129 (2d Cir. 2003), and the Eleventh Circuit in *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992): "The operation of [*Williamson County*], much like the abstention doctrine at issue in *England*, forces would-be federal court litigants to first litigate their claims in state court." *Fields*, 953 F.2d at 1104.

The Ninth Circuit's contrary holding is also extremely unfair. *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 343 F.3d 651 (9th Cir. 2003), affirmed the dismissal of a takings claim on *Williamson County* ripeness grounds even though the California courts had consistently rejected the takings theory in question, which has been adopted by the Ninth Circuit.[2] *Id.* at 658-61. In sending

[2] As explained in the *amici* brief in *Lingle*, the Ninth Circuit, applying this Court's regulatory takings jurisprudence, has recognized that regulatory schemes that create a "premium" do not substantially

(Continued on following page)

the case off to the state courts for ripening, the Ninth Circuit assured the plaintiff that its eventual return to federal district court would not be burdened by any issue or claim preclusion:

> We are sympathetic to Hacienda's concerns about issue preclusion and res judicata, but we believe that Hacienda may reserve its federal claims while it pursues its state remedies. If the California courts do apply an unconstitutionally deferential standard of review, Hacienda's federal taking claim will not be precluded on appeal to federal courts because the issue will not have been properly litigated in state court.

Id. at 661. In the case below, however, the same Circuit has held to the contrary. It was right the first time, in *Hacienda*.

advance legitimate state interests. *See Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997); *Chevron USA v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000); *Chevron USA, Inc. v. Lingle*, 363 F.3d 846 (9th Cir.), *cert. granted*, ___ U.S. ___ (2004); *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004). In contrast, California courts have repeatedly and consistently rejected this Court's "substantially advances" standard and all premium-based theories. *See Santa Monica Beach Ltd. v. Superior Court*, 968 P.2d 993, 1001-05 (Cal. 1999) (expressly rejecting the "substantially advance" standard for rent control cases and opting for lesser standard); *Montclair Park Owners Ass'n v. City of Montclair*, 90 Cal. Rptr. 2d 598, 603-06 (Ct. App. 1999) ("There is good reason for not following the Ninth Circuit" in *Richardson*); *Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623, 627-29 (Ct. App. 1992); *Casella v. City of Morgan Hill*, 280 Cal. Rptr. 876, 884-85 (Ct. App. 1991) (refusing to apply the "substantially advances" test to the vacancy control provisions of a mobilehome rent control ordinance, even though those provisions caused the transfer of "premiums" to tenants).

The holding below is also flatly contrary to the Restatement rule. The authors of the Restatement concluded that federal courts should not give preclusive effect to state court proceedings if doing so would interfere with a "scheme of federal remedies." Section 86, of the Restatement (Second) of Judgments ("Section 86") reads:

> § 86 Effect of State Court Judgment in a Subsequent Action in Federal Court
>
> A valid and final judgment of a state court has the same effects under the rules of res judicata in a subsequent action in a federal court that the judgment has by the law of the state in which the judgment was rendered, except that:
>
> (1) An adjudication of a claim in a state court does not preclude litigation in a federal court of a related federal claim based on the same transaction if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court; and
>
> (2) A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question.

By its terms, Section 86 addresses both claim preclusion (paragraph 1) and issue preclusion (paragraph 2). Moreover, Comment f to Section 86 broadly embodies *England* by citing situations where a federal claim is expressly reserved in state court. Comment f states that, even if the state court "decides the federal claim despite

claimant's endeavor to withhold it, that decision does not necessarily foreclose redetermination by the federal court." The Reporter's Notes to Comment f cite *England* as an example of the withholding of a federal claim.

Williamson County involves a "scheme of federal remedies" within the meaning of Section 86: certain plaintiffs wishing to assert takings claims must first go to state court before returning to federal court. Nor does anything in *Williamson County* suggest a departure from the Restatement rule. Accordingly, this Court should expressly adopt that rule now as to state court proceedings required under *Williamson County* – whether the plaintiff is returning to federal court after a ripeness dismissal or, as is often the case, a plaintiff ripens its takings claim in state court in the first instance. *See, e.g., DLX, Inc. v. Kentucky*, 381 F.3d 511 (6th Cir. 2004) (because of *Williamson County*, takings plaintiff initially filed suit in state court in order to exhaust state remedies).

Alternatively, this Court may wish to adopt the approach taken by the Second Circuit in *Santini v. Conn. Hazardous Waste Management Service*, 342 F.3d 119, 127-30 (2d Cir. 2003). The Second Circuit in *Santini* allows plaintiffs to exhaust their state remedies, as required by *Williamson County*, while at the same time reserving their federal claims for resolution in federal court by asserting an *England* reservation. *Id.*

> It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim – a state-court inverse condemnation action – also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson*

> *County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court. Thus, in permitting state-court litigants to reserve their federal takings claims for determination in subsequent federal-court actions, we decline to interpret *Williamson County* in such a way as to deprive a large class of prospective plaintiffs of federal forums for their federal takings claims.

Id. Here, the application of the *Santini* rule is even more compelling because, as noted above, California courts do *not* follow federal takings law. *See* footnote 2, *supra*.

The Eleventh and Fourth Circuits have adopted similar approaches, *see Fields*, 953 F.2d at 1305-06; *Front Royal & Warrant County Indust. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998), and the Sixth Circuit recently adopted the same rule for claim preclusion (although it did not address the issue for issue preclusion). *DLX, Inc.*, 381 F.3d at 523. If this Court adopts this approach, its decision should be applied *prospectively* so that property owners who have already exhausted their state remedies, without explicitly asserting an *England* reservation, are not precluded from later asserting their federal claims by their failure to make an *England* reservation. *See Santini*, 342 F.3d at 130 ("Although Santini did not make such a reservation in Connecticut state court, we apply the reservation requirement prospectively only, and we deem Santini, who neither litigated his federal claim in state court nor sought to do so, to have reserved his federal claim").

Nothing in the full faith and credit statute (28 U.S.C. § 1738) dictates, or even supports, the Ninth Circuit's holding. Judge Wisdom held more than 30 years ago that "other well-defined federal policies, statutory or *constitutional*, may compete with [the] policies underlying" the full faith credit statute and, thus, a state court judgment need not always be given preclusive effect. *American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (Wisdom, J.) (emphasis added). *See also*, *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977) (competing federal policies justify departure from the full faith and credit statute); Restatement (Second) of Judgments § 86 Rptr. Notes comm. d (collecting cases "finding an exception" to the full faith and credit statute); 18B Wright & Miller, *supra*, § 4469 n.14 (same); Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L.Rev. 1360, 1384 (1967) (noting that federal policies may support not giving preclusive effect to state court proceedings if a "federal purpose or interest" would be undermined).

Moreover, the full faith and credit statute is almost as old as Article III courts themselves, having originally been adopted as part of the Act of May 26, 1790, c. 11, 1 Stat. 122. 18B Wright & Miller, *supra*, §§ 4467 n.10 & 4468 n.12 (explaining legislative history). This Court was obviously aware of the full faith and credit statute when it decided *Williamson County*; yet that decision plainly promises plaintiffs a full airing of their claims in federal court notwithstanding prior state court proceedings.

Nor does *Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984) compel a different result. As noted by the Eleventh Circuit in *Fields*, Justice Blackmun in *Migra* cautioned that the Court's holding was based on the voluntary

nature of the state court action at issue. Justice Blackmun distinguished that situation from one where a federal court litigant is involuntarily forced into state courts. *Fields*, 953 F.3d at 1304 (*citing Migra*, 465 U.S. at 85 n.7). Indeed, Justice Blackmun in *Migra* expressly referred to an *England* reservation and noted that "the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court." *Id. Williamson County* has created an entire class of property owners involuntary forced into state court litigation, either in the first instance or, as in this case, after being directed to do so by a federal court.

For all the foregoing reasons, the Ninth Circuit's application of issue preclusion in this case was erroneous and should now be reversed.

II. THE NINTH CIRCUIT'S HOLDING WOULD BE ESPECIALLY PERNICIOUS FOR OWNERS OF RENT CONTROLLED MOBILEHOME PARKS

We have already cited this Court's holding in *England*, 375 U.S. at 416, that the essence of adjudication is "constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." For that reason, *where* the dispositive facts are found is equally important. Notably, *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), rejected an exhaustion-of-state-remedies requirement for § 1983 actions in part because of Congressional "mistrust . . . for the fact-finding processes of state institutions. . . . This [1871] Congress believed that federal courts would be less susceptible

to local prejudice and to the existing defects in the fact-finding processes of the state courts." *Id.* at 506.

Patsy also held that the foregoing concern was even more pronounced when the suspect local adjudication begins at the administrative level. "This perceived defect in the States' factfinding processes is particularly relevant to the question of exhaustion of administrative remedies: exhaustion rules are often applied in deference to the superior factfinding ability of the relevant administrative agency." *Id.* Simply stated, a biased administrative forum is even more dangerous to § 1983 claimants than a biased judicial forum.

But if the Ninth Circuit's holding below were upheld, owners of rent controlled mobilehome parks would be subjected to the worst of all worlds: issue-preclusive rulings emanating from biased local administrative regimes. A distinguished member of the California Supreme Court, Justice Janice Rogers Brown, has likened § 1983 claims of local racial prejudice to § 1983 claims of local prejudice against mobilehome park owners in California. Justice Brown argued that, in both situations, "a fair resolution of a constitutional breach cannot include sending an aggrieved party back to the same administrative system that caused the injury in the first place. On the contrary, the driving purpose of section 1983 is to get the plaintiff out of the corrupt state system where constitutional rights are being violated and into federal court where wrongs can be fairly redressed." *Galland v. City of Clovis*, 16 P.3d 130, 162-63 (Cal. 2001) (Brown, J., dissenting) (dissenting from holding that a § 1983 action may not be maintained in California state courts until a controversial administrative remedy created by *Kavanau v. Santa*

Monica Rent Control Board, 941 P.2d 851 (Cal. 1997) has been exhausted).

The very existence of mobilehome rent control ordinances throughout California reflects the local political power of mobilehome owners who rent their coach space and related amenities from the park owner. ELS's park in San Rafael, California, for example, currently houses 659 people – a significant voting bloc in a town where only 9,703 votes were cast in the last mayoral election.[3] The electoral power of mobilehome owners is even stronger in other rent control jurisdictions like Santee, California, where ELS's park is only one of eleven such properties.[4] In a larger city like San Jose, California, its 10,658 mobile homes[5] generate a potent political force for aggressive rent control policies.

Even more pointedly, the combined voting force of mobilehome owners and their subtenants vastly outweighs the tiny number of park owners in any local jurisdiction. A corporate, out-of-state park owner like ELS weighs even lighter on the political scales. Beyond the lack of a vote, such an owner is all too easily demonized as a "rapacious" outsider subjugating its allegedly poor and vulnerable local tenants.

Political attacks along that line also resonate with the general population of renters. In San Jose, renter-occupied units in the 2000 census represented 42% of all housing

[3] *See* the League of Women Voters of California's "Smart Voter" website at http://www.smartvoter.org/2003/11/04/ca/mrn/city.html.

[4] *See* http://www.ci.santee.ca.us/dhr/AnnualFundingPlan03.pdf.

[5] *See* http://www.sanjoseca.gov/planning/Census/Citywide_dp_pdf/housing_char_2000-4.pdf.

units analyzed (252,276).[6] But in San Rafael, the seat of affluent Marin County, renter-occupied units analyzed in the 2000 census represented an astounding 51% of all housing units (20,143) so studied.[7] Thus, tenants as a political constituency add considerable weight to the constituency of mobilehome owners and their subtenants.

The same political forces that account for mobilehome rent control in the first place also invest its administration with prosecutorial zeal against park owners. Rent control board members are, after all, appointed by the same local political forces that enacted rent control. Such board members do not bite the hands that appoint them. On the contrary, they are likely to covet higher office themselves, and therefore pursue aggressive rent control policies to curry additional favor with the political forces that landed them on the rent board.

Indeed, in a number of jurisdictions the local administrations and town counsel have joined forces with associations of mobilehome owners in litigation and political campaigns against the park owner. ELS (formerly known as Manufactured Home Communities, Inc.) has experienced this phenomenon in recent years in San Rafael, Santee, San Luis Obispo, Santa Cruz and San Jose.

One power wielded by these same political forces has particular significance in appraising the Ninth Circuit's ruling below on issue preclusion. Local officials appoint supposedly neutral hearing officers who decide rent

[6] *See* http://www.sanjoseca.gov/planning/Census/Citywide_dp_pdf/housing_char_2000-4.pdf.

[7] *See* http://www.bayareacensus.ca.gov/cities/SanRafael.pdf.

control cases at the administrative level.[8] But in fact, the financial incentive of such hearing officers is to decide their cases to please those holding the power of appointment. Aside from skewing individualized rent adjustment disputes, this structural economic bias has even greater force when a park owner dares attack the rent control ordinance itself, facially or as applied, under the Fifth Amendment or other constitutional authority. The "neutral" hearing officer's economic incentive to make findings in favor of the ordinance is overwhelming.

This Court has long held that an economic bias of that kind destroys the impartiality that Due Process requires of governmental decision-makers. *Ward*, 409 U.S. at 57; *Tumey v. Ohio*, 273 U.S. 510 (1927). Indeed, the California Supreme Court recently applied those precedents in holding that "[c]ounties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work." *Haas v. County of San Bernardino*, 45 P.3d 280, 283 (Cal. 2002). Unfortunately, mobilehome rent control jurisdictions continue to operate as they always have. And even if they were forced to comply with *Haas*, the underlying structural bias against park owners would find other ways to express itself.

This Court has also held in *Ward* and *England* that the opportunity for local judicial review, and certiorari or appellate review here, is neither a substitute nor a cure for

[8] *E.g.*, Title 20, San Rafael Municipal Code (Mobilehome Rent Stabilization), § 20.12.060 (city manager appoints rent dispute "arbitrator"); Title 17, Chapter 17.22, San Jose Municipal Code (Mobilehome Rent Ordinance), § 17.22.050 (administrative hearing officer appointed by city council or city manager).

a biased forum at the fact-finding stage. *Ward* held that the "procedural safeguard" of local judicial review

> does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Ward, 409 U.S. at 61-62. Similarly, *England* held that "[l]imiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings." *England*, 375 U.S. at 416.

In addition, *Patsy's* special warning about biased administrative regimes adds considerable weight to *Ward* and *England*. California's courts, like most, offer only a deferential review of many key administrative rulings. In one case involving *amicus* ELS, for example, then known as Manufactured Home Communities, Inc. ("MHC"), an administrative hearing officer in San Jose not only made factual findings adverse to MHC in a test-case rent adjustment dispute but also interpreted the newly adopted ordinance amendment adversely to MHC. Nevertheless, the state appellate court held that deference was due to both types of ruling at the trial court level. And on appeal, the court offered only a substantial evidence review of the factual findings, and deferred to the legal ruling, too, on the grounds of the hearing officer's presumed expertise and experience (despite her presumptive bias). *MHC*

Operating Limited Partnership v. City of San Jose, 130 Cal. Rptr. 2d 564, 573-75 (Ct. App. 2003).[9]

Aggravating this situation are two doctrines established by case law in California. First, the California Supreme Court held in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997), that the sole remedy in many rent control taking cases is a trip back to the same biased administrative regime that committed the constitutional violation in the first place. *Kavanau* held that the sole remedy for an unconstitutionally suppressed rent is not a monetary award against the responsible public entity, but rather a discretionary "consideration" of the past constitutional violation when the administrative body meets to establish future rents. As Justice Brown aptly protested in the present case, "the lamb [has been] committed to the custody of the wolf." *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 120 (Cal. 2002) (Brown, J., dissenting) (*quoting* The Works of John Adams).

Second, California's appellate courts have openly announced their rejection of the Ninth Circuit's consistent holding (footnote 2, *supra*) that rent control laws do not substantially advance their avowed purpose of securing

[9] *Hensler v. City of Glendale*, 876 P.2d 1043, 1052-53 (Cal. 1994), appears to require *de novo* trial court review of all administrative decisions on takings claims, but more recent California cases raise doubt about the scope of *Hensler*'s application. One appellate court, for example, appeared to hold that deferential (substantial evidence) review applies to any decision of a mobilehome rent control board against a park owner on the grounds that it is not asserting a "fundamental vested right." *MHC Operating Limited Partnership*, 130 Cal. Rptr. 2d at 573-75. However, no takings claim had been asserted in that case.

affordable housing if the reduced rents they impose are offset by higher capital costs. *E.g.*, *Montclair Parkowners Ass'n v. City of Montclair*, 90 Cal. Rptr. 2d 598, 603-06 (Ct. App. 1999) ("We are not persuaded.")

For the foregoing reasons, ELS urges this Court to reject the Ninth Circuit's holding below to avoid not only error, but also unique and intolerable prejudice to owners of rent controlled mobilehome parks in California.

III. CALIFORNIA'S IMPOSITION OF RENT CONTROL ON MOBILEHOME PARKS DEMONSTRATES THAT THE NINTH CIRCUIT'S HOLDING WOULD FORECLOSE VALID TAKINGS CLAIMS FROM BEING LITIGATED ON THEIR MERITS IN FEDERAL COURT

This case demonstrates only one of the problems that *Williamson County* has created: after twelve years of litigation, including three published appellate decisions, petitioners' federal takings claim remains unresolved on its merits. *Amici* submit this brief, in part, to demonstrate to the Court that California's unique imposition of rent control on mobilehome parks raises serious constitutional questions and that the Ninth Circuit's decision in this case, if permitted to stand, may well prevent valid constitutional claims from ever being litigated on their merits in federal court.

In *Lingle v. Chevron USA, Inc.*, docket No. 04-163, pending before the Court this term, *amici* and a group of economists submitted an *amici curiae* brief to this Court explaining the economic and practical consequences of California's imposition of rent control on mobilehome parks. The arguments in that brief will not be repeated,

but as set forth therein, California's system of rent control for mobilehome parks does not advance any legitimate state purpose. Instead, it constitutes a one-time transfer of wealth from mobilehome park owners to tenants and, as such, is unconstitutional under the "substantially advances" standard this Court has applied in regulatory takings cases for a quarter of a century.

California's imposition of rent control was before this Court in *Yee*. This Court held that the rent control did not constitute a *physical* taking, but declined to address whether it constituted a *regulatory* taking (*i.e.*, whether or not it substantially advances a legitimate state purpose) because the issue was not properly before the Court. Following *Yee*, the issue has been fully litigated in the lower courts and the Ninth Circuit has recognized that when a regulation may give rise to a "premium," the regulation is unconstitutional. *See* footnote 2, *supra*. Applying these principles to California's imposition of rent control on mobilehome park owners, the Ninth Circuit recently held that one such ordinance was unconstitutional because it failed to contain a mechanism to prevent the transfer of a "premium" and, thus, could not substantially advance a legitimate state interest. *Cashman*, 374 F.3d at 896-99. Such a rent control ordinance is unconstitutional unless the governmental entity can prove that externalities prevent the creation of a "premium." *Id.*

As demonstrated in *amici's* brief in *Lingle*, statistical studies have demonstrated that rent control of mobilehome parks creates a "premium." Accordingly, California's imposition of rent control clearly raises serious and significant constitutional issues. Yet, the Ninth Circuit's decision in this case, if permitted to stand will foreclose

many of these claims from being litigated on their merits by an Article III court. Moreover, *Williamson County* has created a system in which state and local governmental entities seek to force federal takings claims into state court, both as a function of forum-shopping[10] and to cause delay to financially "wear out" all but the most financially solvent and determined property owners. This problem is even more pronounced in California, because California state courts have consistently refused to apply appropriate heightened standards to review regulatory takings and have rejected the "premium" based theories recognized by this Court in *Yee* and adopted by the Ninth Circuit. *See* footnote 2, *supra*.

Therefore, *amici* urge this Court not only to reverse the Ninth Circuit's decision in this case, but to use this case to limit or overrule *Williamson County*, as set forth in Section IV, so that legitimate constitutional claims can be adjudicated on their merits in federal court.

---

[10] Consider the Cashmans, who recently prevailed before the Ninth Circuit. *Cashman*, 374 F.3d at 896-99. Even though they were permitted to bring a facial challenge, which is not subject to *Williamson County's* exhaustion requirement, *Yee*, 503 U.S. at 533-34, shortly *after* the Cashmans filed suit in federal court, the City of Cotati filed a declaratory relief action in state court, seeking a declaration as to the constitutionality of the rent control ordinance. Why did the City of Cotati file this duplicative action? The City of Cotati conceded that its purpose was to "gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance" (based on the state authorities cited in footnote 2) and to "seek to persuade the federal [district] court to abstain" from hearing the Cashman's case. *City of Cotati v. Cashman*, 52 P.3d 695, 698 (Cal. 2002). The state trial court imposed sanctions on the City of Cotati for chilling the Cashman's constitutional rights and ordered the case dismissed under California's Anti-SLAPP statute. Cal. Code Civ. Proc. § 425.16. The California Court of Appeal and the California Supreme Court set those sanctions aside.

IV. *WILLIAMSON COUNTY* SHOULD BE HELD INAPPLICABLE TO "AS APPLIED" REGULATORY TAKINGS CLAIMS WHERE "JUST COMPENSATION" IS IRRELEVANT

As demonstrated by this case, and by the *amicus* briefs submitted in support of the certiorari petition, *Williamson County* is in need of repair. *Williamson County* allowed the federal claim to be preserved while state law issues were resolved. Reversing the Ninth Circuit's decision in this case will make it clear that after a property owner has exhausted state remedies, as required by *Williamson County*, the owner has a right to have a federal court pass on the merits of their constitutional claim, unimpeded by the state court proceedings.

In considering mechanisms to address the problems created by *Williamson County*, this Court should clarify that *Williamson County's* exhaustion requirement does not apply to "as applied" regulatory takings claims challenging whether a statute or ordinance substantially advances a legitimate state interest.

Under current law, property owners wishing to assert a takings claim are placed in an unfair bind. *Williamson County's* exhaustion requirements appropriately do not apply to a facial claim which challenges the constitutionality of a regulation "on its face." *Yee*, 503 U.S. at 534. Yet the Ninth Circuit has held that facial claims are subject to a statute of limitations defense and are time-barred unless brought within two years of the enactment of the challenged regulation. *See Hacienda*, 353 F.3d at 655; *Levald, Inc. v. City of Palm Desert*, 998 F.3d 680, 688 (9th Cir. 1993).[11] Therefore, unless the property owner happened to own the property in question at the time the statute was enacted, or acquired it shortly thereafter, it cannot bring a "facial" claim and must bring an "as applied" claim, which lower courts have held are subject to *Williamson County's* exhaustion requirement. *See, e.g., Hacienda*, 353 F.3d at 655 (noting that a takings claim is time-barred, if brought as a "facial" claim, or unripe, if brought as an "as applied" claim).

However, the exhaustion requirements of *Williamson County* are equally inapplicable to Fifth Amendment claims in the "as applied" context. Such claims are borne out of the same failure of the regulation to advance any public purpose and cannot be cured by "Just Compensation." Accordingly, claimants bringing such "as applied" claims do not seek "Just Compensation" under the Fifth Amendment; instead they seek injunctive relief, a determination the regulation is unconstitutional and ordinary damages for the losses caused by the imposition of the regulation.

Much of the confusion comes from the following statement in *Williamson County*, which has been misconstrued by lower courts:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.

---

[11] Permitting the statute of limitations to be applied in this matter runs afoul of *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-27 (2001), wherein this Court held that a state should not be able to "put an expiration date on the Takings Clause." *See Hacienda*, 353 F.3d at 656 n.5 (declining to decide whether, in light of *Palazzolo*, the statute of limitations remains a valid defense to "facial" takings claims).

Williamson County, 473 U.S. at 194. This statement is both overbroad, because it suggests that "Just Compensation" is relevant to *all* takings inquiries, and under inclusive because it fails to take into account that a valid taking *also* requires that a legitimate public purpose be advanced.

The Takings Clause of the Fifth Amendment reads: "nor shall private property be taken for public use, without just compensation." Thus, the text of the Takings Clause "imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation*, 538 U.S. 216, 231-32 (2003). Accordingly, whenever the government takes private property, it must be for a "public use" and, *if* for a "public use," then "just compensation" must be paid. *Id.* at 233. Conversely, a governmental entity can never take private property for a private, not public, purpose regardless of the amount of "just compensation" paid. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

If a statute or ordinance does not substantially advance a legitimate state purpose, then the Public Use clause has been violated and the governmental entity did not have the authority to pass the regulation in the first instance. In that case, no amount of "Just Compensation" can make the constitutional violation go away and exhaustion under *Williamson County* serves no purpose. Thus, "Just Compensation" is irrelevant to these claims and the remedy is an injunction against future enforcement of the unlawful regulation and ordinary damages for losses incurred. As Justice O'Connor wrote in *Midkiff*:

> [A] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and *would thus be void*. (Emphasis added).

Midkiff, 467 U.S. at 245. "Rather, the proper remedy for an invalid exercise of the police power is amendment or withdrawal of the regulation and, if authorized and appropriate, damages." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994). Similarly, Professor Tribe has written:

> However, if a [takings] challenge is to the complete absence of any public purpose, that challenge is ripe without resolution of any "just compensation" issue.

1 Laurence H. Tribe, *American Constitutional Law* § 3-10 n.26 (3d ed. 2000).

In *Yee*, this Court held that *Williamson County* exhaustion is not required for facial takings claims because facial claims do not "depend on the extent to which petitioners are deprived of the economic use of their particular property or the extent to which these particular petitioners are compensated." *Yee*, 503 U.S. at 534. The same is true in the "as applied" context when a regulation fails to substantially advance a legitimate state purpose: the governmental entity lacked the authority to pass the regulation in the first instance and the amount of compensation is irrelevant. Thus, the distinction between "facial" and "as applied" claims has no place in this type of regulatory takings claim because, as noted above, the remedy for a failure to substantially advance a legitimate purpose claim is not "Just Compensation," but, rather, monetary damages and withdrawal of the offending regulation. This

is true whether the law fails to substantially advance a government purpose "as applied" or on its face; in either event, the governmental agency lacked the authority to pass the regulation in the first instance and it is void. *Midkiff*, 467 U.S. at 245.

The inappropriateness of *Williamson County's* exhaustion requirements in these type of regulatory takings claims is even more compelling in states such as California, where state procedures provide *no* remedy. In the context of rent control, if the regulation does not substantially advance a legitimate state purpose, as discussed above, the regulation is void. In that case, the property owner is permitted to charge market rents. Yet, under California law, there is simply no ability to obtain market rent or any damages for past constitutional violations. Instead, the sole remedy is a discretionary adjustment of *future* rents. *Kavanau*, 941 P.2d at 865-66. This requires property owners to go through years of administrative and judicial proceedings just to obtain modest rent increases. *See, e.g., Galland*, 16 P.3d at 136-43 (describing 13 years of administrative and judicial proceedings in order to obtain $5 and $25 rent increases). But adjusting future rents, in a regulated environment, does not right the constitutional wrong. As the Ninth Circuit correctly noted in *Cashman*:

> However, . . . an incumbent tenant selling his/her mobilehome can nonetheless extract a premium above and beyond any such rental increase based on the security of living in a mobilehome park where future rental increases are limited by the government.

Cashman, 374 F.3d at 895. In other words, only when the marketplace is allowed to operate with respect to both aspects of housing costs (rent and home prices) will the

premium be eradicated. Nonetheless, the Ninth Circuit seemingly agrees that California's procedures provide an adequate remedy under *Williamson County*, despite only a theoretical chance the property owner may obtain any relief. *See, e.g., Hacienda*, 353 F.3d at 659-60 (requiring exhaustion of state remedies even though "we are left with uncertainty as to the efficacy of" state procedures). Furthermore, as noted above, footnote 2, *supra*, California applies the incorrect legal standard, thereby making exhaustion all the more futile.

In *Williamson County*, this Court held that the claim at issue arose under the "Just Compensation Clause." 473 U.S. at 186. As demonstrated above, the "Just Compensation Clause" is irrelevant in determining whether a land use regulation substantially advances a legitimate state interest. Compensation cannot cure the constitutional deficiency of a regulation's failure to advance a legitimate state purpose. Accordingly, this Court should clarify that *Williamson County* exhaustion is not required in order to pursue an "as applied" regulatory takings claim based on a failure to substantially advance theory. *Cashman*, 374 F.3d at 892 n.6 ("we hold that the denial of compensation is irrelevant for ripeness purposes where a takings claim is based on the theory that the ordinance does not substantially advance a legitimate state interest").

Alternatively, *Williamson County* should simply be overruled. Property owners are the only group required to exhaust state remedies prior to bringing a Section 1983 claim and it is hard to rationalize why private property owners should be so singled out.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed and *Williamson County* should be clarified as inapplicable to "as applied" takings claims challenging whether a statute or ordinance substantially advances a legitimate state interest.

Dated: January 24, 2005

Respectfully submitted,

ELLEN KELLEHER
Executive Vice President &
General Counsel
EQUITY LIFESTYLE
PROPERTIES, INC.

EDITH R. MATTHAI
STEVEN S. FLEISCHMAN
ROBIE & MATTHAI, APC

ELLIOT L. BIEN
(*Counsel of Record*)
BIEN & SUMMERS LLP